

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35482

STATE OF IDAHO,	)	2010 Unpublished Opinion No. 352
	)	
Plaintiff-Respondent,	)	Filed: February 17, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
MICHAEL T. HAYES,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the First Judicial District, State of Idaho, Shoshone County. Hon. Fred M. Gibler, District Judge.

Order denying motion for new trial, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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LANSING, Chief Judge

Michael T. Hayes appeals the denial of his motion for a new trial on one count of lewd conduct with a minor. He contends that the district court erred when it held that the newly discovered testimony of an absent witness was not likely to produce an acquittal. We affirm.

I.

**BACKGROUND**

This is a companion case to that which was before this Court in *State v. Hayes*, 144 Idaho 574, 165 P.3d 288 (Ct. App. 2007) (*Hayes I*). In that opinion, we described the background of the two cases:

The State's case at trial included evidence of the following. Hayes was acquainted with the parents of fifteen-year-old T.L., and in November 2001, he began to visit the family with increased frequency. In April 2002, Hayes began to flirt with T.L., give her money, and request that she have sexual intercourse with him. T.L. initially refused, but later they began a sexual relationship. Over the Fourth of July holiday in 2002, Hayes took T.L., her parents, and her sister on a

four-day camping trip in Kootenai County. An individual named Thomas Pratt joined the group for part of the trip. According to T.L.'s subsequent testimony, Hayes had sexual intercourse with her on each of the four days of the camping trip. In September 2002, T.L. decided to run away from home because she had an argument with her father. She went to Hayes's home in Shoshone County, where she and Hayes had sexual intercourse.

Hayes was charged in Kootenai County with four counts of lewd conduct with a minor under the age of sixteen, Idaho Code § 18-1508, for his alleged conduct with T.L. over the Fourth of July holiday. Hayes was also separately charged in Shoshone County with one count of lewd conduct with a minor for sexual contact with T.L. in September. The Kootenai County and Shoshone County cases were joined for trial. At trial, the State also presented evidence of several other uncharged incidents of sexual contact between Hayes and T.L.

The jury found Hayes guilty of the Shoshone County charge. Of the four Kootenai County charges, however, the jury returned a guilty verdict on only one--for lewd conduct that was alleged to have occurred on July 6. The jury found Hayes not guilty of the allegation of lewd conduct on July 4, and was unable to reach a verdict on the counts charging offenses on July 5 and 7. For the two convictions--one count in each county--the district court imposed concurrent unified forty-year sentences with minimum terms of twenty years. We affirmed these convictions in *State v. Hayes*, Docket Nos. 30574 and 30591 (Ct. App. Jan. 19, 2006) (unpublished).

Before trial, Hayes's attorney had been unsuccessful in attempts to locate and contact Thomas Pratt, who had been present during the Fourth of July trip in Kootenai County. After the trial, however, Hayes was able to find Pratt in Connecticut. Pratt thereafter signed an affidavit in which he contradicted T.L.'s testimony concerning the events of July 6 and provided an alibi for Hayes. Pratt's affidavit stated that he had been with Hayes during two of the times when T.L. had testified that the sexual acts occurred, including the alleged incident on July 6, and that the alleged offenses never occurred. Asserting that this affidavit provided newly discovered evidence, Hayes moved for a new trial in the Kootenai County case. The district court determined that the affidavit constituted newly discovered, material evidence that had been unavailable at trial despite diligent efforts on the part of the defense. The court nevertheless denied Hayes's motion for a new trial because the court concluded there was no probability that this new evidence would produce an acquittal.

*Id.* at 576-77, 165 P.3d at 290-91 (footnote omitted).

*Hayes I* was an appeal from the district court's denial of Hayes's motion for a new trial in the Kootenai County case. Hayes had also filed a motion for a new trial in the Shoshone County case asserting the same grounds for relief and with the same affidavit evidence in support, but the Shoshone County district court stayed proceedings on that motion pending the issuance of our decision in *Hayes I*. In *Hayes I* we held that the evidence presented on Hayes's motion in the

Kootenai County case demonstrated that he was entitled to a new trial. We therefore reversed the district court's denial of the motion and remanded for a new trial.

Unlike the motion at issue in *Hayes I*, Hayes's motion in the present case was not decided on the basis of Thomas Pratt's affidavit. Instead, the State insisted that Pratt present his testimony in person at the hearing and subjected him to cross-examination concerning his previously unchallenged written averments.<sup>1</sup> The district court determined that Pratt's testimony constituted newly discovered, material evidence that had been unavailable at trial despite diligent efforts on the part of the defense, but nevertheless denied Hayes's motion for a new trial because the court concluded there was no probability that this new evidence would produce an acquittal in the Shoshone County case. Hayes appeals.

## II. ANALYSIS

On a defendant's motion in a criminal case, the trial court may grant a new trial in the interest of justice. Idaho Criminal Rule 34. Idaho Code § 19-2406(7) specifies the permissible grounds for a new trial, and authorizes a new trial when the defendant demonstrates that there exists new evidence material to the defense that could not have been produced at the trial with reasonable diligence. Newly discovered evidence will warrant a new trial only if it satisfies a four-part test, showing that: (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) it will probably produce an acquittal; and (4) failure to learn of the evidence was not due to a lack of diligence on the part of the defendant. *State v. Drapeau*, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976); *State v. Ames*, 112 Idaho 144, 146, 730 P.2d 1064, 1066 (Ct. App. 1986). We review the denial of a motion for new trial for an abuse of discretion. *State v. Egersdorf*, 126 Idaho 684, 687, 889 P.2d 118, 121 (Ct. App. 1995). A motion for a new trial based on newly discovered evidence involves questions of both fact and law. An abuse of discretion will be found if the trial court's findings of fact are not supported by substantial evidence or if the trial court does not correctly apply the law. *See Fullmer v. Collard*, 143 Idaho 171, 173, 139 P.3d 773, 775 (Ct. App. 2006). Motions for a new trial based on newly discovered evidence are

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<sup>1</sup> Pratt's testimony at the motion hearing differed from some of the averments in his affidavit, including the testimony concerning whether he was in the presence of Hayes at all times during the 2002 Fourth of July holiday camping trip in Kootenai County.

disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making, and conservation of scarce judicial resources. *State v. Eddins*, 142 Idaho 423, 425, 128 P.3d 960, 962 (Ct. App. 2006).

At issue here is whether the district court erred in concluding that Pratt's testimony would not be likely to produce an acquittal. In reversing the denial of Hayes's new trial motion in the Kootenai County case, we focused on the victim's credibility problems, the lack of evidence corroborating the victim's testimony about the four Kootenai County charges, and the jury's demonstrated unwillingness to convict on the victim's word alone. *Hayes I*, 144 Idaho at 579-80, 165 P.3d at 293-94. We also distinguished the circumstances and evidence pertaining to the Kootenai County charges from those pertaining to the Shoshone County charge:

Before resolving whether the district court was correct in holding that Pratt's testimony would not probably produce an acquittal, we must also consider other evidence that was heard by the jury and considered by the district court. *There was extensive evidence, much of it corroborated by third parties, that Hayes and T.L. had been engaged in a sexual relationship all summer. Incidents described by T.L., and corroborated by either her sister or a friend, included sexual relations during two trips to Montana as well as the incident of lewd conduct for which Hayes was convicted in Shoshone County.* On the other hand, there was also extensive impeachment evidence challenging T.L.'s general veracity and reliability. This included evidence that she had made an apparently false accusation, later recanted, that her father had been sexually abusing her. Several years earlier she had made another apparently false accusation of sexual abuse by a man with whom her mother was then having a relationship. Some of T.L.'s testimony about the specific charged offenses was contradicted by the testimony of other trial witnesses.

The jury ultimately found Hayes guilty of only two of the five lewd conduct charges on which he went to trial, and on one of those, the Shoshone County charge, T.L.'s testimony describing an event of sexual intercourse was corroborated by her girlfriend who was with T.L. at Hayes's house. Thus, notwithstanding evidence of a lengthy sexual relationship between Hayes and T.L., it is apparent that the jury did not fully credit T.L.'s testimony and was hesitant to convict on her word alone, either acquitting Hayes or being unable to arrive at a verdict on three counts that were supported solely by T.L.'s uncorroborated testimony.

*Id.* (emphasis added).

Here, in denying the motion the district court relied, in part, on our above-emphasized discussion of the differences in evidence between the two charges, and it provided more detail regarding the girlfriend's trial testimony. The court stated:

The victim's friend testified that she and the victim went to Hayes's residence in Shoshone County. Hayes was dressed only in his underwear. Hayes placed his hand under the victim's shirt and started rubbing her stomach. The victim told her friend that she wanted to have sex with Hayes. The victim and Hayes were left alone in the bedroom. The victim later emerged from the bedroom buttoning up her pants. The victim told the girlfriend she and Hayes "just got done having sex three times." Hayes then emerged from the bedroom wearing a robe.

In addition to the evidence provided by the girlfriend there was other evidence, unrelated to the conduct in Kootenai County, which was corroborated by third parties that Hayes and T.L. had been engaged in a sexual relationship all summer. Unlike the Kootenai County case, Hayes was not convicted in the Shoshone County case solely on the uncorroborated testimony of the victim. Given the weight of the evidence produced, it is not probable that Pratt's testimony, which related only to the Kootenai County charge, would have resulted in an acquittal on the Shoshone County charge.

The district court's recitation of the girlfriend's trial testimony is supported by the record and, in fact, her testimony was far more detailed and graphic. Hayes has suggested no reason why this witness would have lied, and her recitation of detail lends credence to her testimony. Perhaps most important to the resolution of the issue before us--and a critical distinction from the Kootenai County case addressed in *Hayes I*--is that Pratt's newly discovered testimony does not contradict the victim's testimony about the Shoshone County charge. His testimony relates only to events that occurred in Kootenai County. In view of all the trial evidence relating to the Shoshone County charge, there was no abuse of discretion in the district court's conclusion that the use of Pratt's testimony would not probably produce an acquittal in the present case.

Accordingly, the district court's order denying Hayes's motion for a new trial is affirmed.  
Judge GUTIERREZ and Judge GRATTON **CONCUR.**